virtue of section 122 of the Criminal Procedure Code as being a "statement made by any person to a police officer or an inquirer in the course of any investigation" under Chapter XII of the Code.

Undoubtedly this submission is correct. Mr. Littman attempted to save the admissibility of the evidence by a suggestion that the statements appear on the evidence to have been made, not during the actual interrogation or in answer to any question, but as information volunteered to the police officer while they were climbing the stairs to his office. The appellant was however in custody at the time, and he was interrogated both before and after they climbed the stairs. Mr. Littman's suggestion thus really amounts to a contention that the statement was made between two investigations, a proposition which their Lordships cannot accept.

To hold that information volunteered at any time between the beginning and end of the investigation may be excluded from the protection of section 122 would in practice defeat the purpose of the section and encourage the mischief against which it is clearly aimed. Nor do the words of the section justify such an interpretation. The protection endures "during the course of the investigation" that is to say from the time when the investigation starts to the time when it ends, and a report is made under section 131‡. Their Lordships accept the view expressed by Howard C.J. (Ceylon) in *R.* v. *Haramanisa*: (2)

"The investigation made by a police officer or inquirer under this chapter covers a wide field and is not limited merely to the examination of persons by the putting of questions. The investigation includes the search for incriminating evidence and the examination of the *locus in quo* and and the locality in the vicinity of the scene of the crime. A statement made by any person to a police officer who was so engaged would, in our opinion, be made in the course of any investigation."

Thus the evidence was wrongly admitted. Had this case been tried by a jury, its effect on their minds and the degree to which, if at all, it might have affected their verdict would be a matter of speculation. But here their Lordships have the learned judge's careful reasons to guide them in estimating its effect. It is clear that he did not regard it as being of any importance. In his long judgment he makes no mention of the fact that the appellant admitted having written the signature on the type-written letter to the bank which was found in the forger's possession. The admission that the appellant wrote the signatures found in his own possession is mentioned casually as a matter of little or no account. It would seem that the learned judge, who heard and disbelieved the appellant's evidence, preferred his own findings and inferences based on the evidence of truthful witnesses to anything that might fall from the lips of the appellant. The facts proved by other witnesses show conclusively the appellant's intention to open by fraudulent means an account for the first accused under a false name and description, an intention which in due course he achieved. The admission of an earlier inchoate step towards that end adds nothing. Thus the evidence erroneously admitted had no effect upon the verdict and there is no justification for disturbing that verdict by reason of its admission.

There remains the question whether the learned judge was entitled to find in the facts relating to the bank account sufficient evidence that the appellant had abetted the first accused in his fraudulent use of the forged cheque.

[*His Lordship then reviewed the other evidence and concluded:*]

In their Lordship's opinion therefore there was sufficient evidence to justify the verdict. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

‡ Section 131 of the Criminal Procedure Code of Ceylon provides:

"Every investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is completed the officer in charge of the police station or inquirer making the same shall forward to the Magistrates's Court within whose division such investigation was made a report in the prescribed form."

SEVEN SEAS SUPPLY CO. v. RAJOO

[F.C. (Tan Ah Tah Ag.C.J. (Singapore), Buttrose and Ambrose JJ.) October 7, 1965]

[Singapore — Federal Court Civil Appeal No. 39 of 1965]

Practice and procedure — Civil trial — Pleadings — Allegation that contract is illegal.

The appellants appealed against the decision of the learned trial judge, who had given judgment against the appellants for $7,000 and costs on a claim for money lent to the appellants. On appeal it was argued that (a) the judge had decided the case on issues not raised on the pleadings; (b) on the evidence the learned judge ought to have found that the plaintiff was a money lender and that the loans were illegal and not recoverable by him.

Held: (1) the core and essence of the claim was for money lent and the judgment was within the four corners of the issues raised by the pleadings as a whole. The learned judge had in effect in this case found that the particulars of the plaintiff's claim were wrong and had accepted those contended for by the defendants;

(2) as the defence of illegality was not pleaded and as all the relevant facts on this issue were not before the court, the court ought not on its initiative to refuse to enforce the contract on the ground of illegality.

Cases referred to:—

(1) *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy* [1964] M.L.J. 99.

(2) *Edler* v. *Auerbach* [1949] 2 All E.R. 692.

(3) *Snell* v. *Unity Finance Ltd.* [1963] 3 All E.R. 50.

FEDERAL COURT.

H. L. Wee (M. N. Samy with him) for the appellants.

L. Rayner for the respondent.

Cur. Adv. Vult.

Buttrose J.: This was an action for money lent.

In view of the argument addressed to us on the hearing of the appeal, I propose to deal firstly with the pleadings. The case as presented by the pleadings was this. The plaintiff in his statement of claim alleged that the sum of $15,000 in all was lent in varying amounts to the defendants between the 9th March and 22nd July, 1961, and that $5,060 had been repaid by instalments between the 10th May and the 28th August, 1961, leaving a balance due to him of $9,940 which he claimed.

The defence was a somewhat curious and confused document. The defendants first of all denied being indebted to the plaintiff either in the sum claimed or at all. They further alleged that on the 1st March, 1961 the plaintiff and the defendants entered into a written agreement, which was produced at the trial, whereby the plaintiff agreed to finance the defendants in their business from time to time with friendly loans free of interest. The defendants alleged that after the execution of this agreement the plaintiff failed to perform his obligations thereunder and they threatened him with civil proceedings for damages for breach thereof. As a result, according to the defendants, the plaintiff agreed to lend money to the defendants not on the terms stipulated in the written agreement but upon payment of interest at 24 per centum per annum and on condition that the nominal borrower should be a government servant who must be prepared to execute I.O.U.'s for the money lent. The defendants agreed to this and offered one Kesar Singh, a government servant who was accepted by the plaintiff. The defendants alleged that pursuant to this agreement, the plaintiff lent to Kesar Singh over a period of six months from the 7th March to the 28th August, 1961, various sums amounting in all to $22,500 which he, in turn, paid to the defendants.

The defendants further alleged that they paid interest to the plaintiff from April to October, 1961, amounting to $2,000. The defendants also said that they have repaid to Kesar Singh the sum of $15,500 out of the sum of $22,500 by instalments between the 14th April and the 7th October, 1961. The defence makes no mention of and is silent as to repayment of the balance oustanding of $7,000.

Notwithstanding their earlier pleading that the loan was in reality to them the defendants go on to allege further that there was no legal nexus between the plaintiff and the defendants and the action against them is misconceived. The defendants counterclaimed the return of the sum of $2,000 paid to the plaintiff as interest.

In his reply and defence to the counterclaim the plaintiff admitted entering into the written agreement with the defendants on the 1st March, 1961, whereby he agreed to make interest free loans to the defendants and averred that the subject matter of his claim is money lent pursuant to that agreement. The plaintiff denied he was in breach of the agreement or that he lent monies to the defendants through Kesar Singh or that he demanded or received payment of any interest.

So much for the pleadings. Before leaving them however I think I should add that taking the defence as a whole I have arrived at the conclusion that it constitutes an admission on the pleadings by the defendants that the money was lent to them. The real transaction was, in my view, between the plaintiff and the defendants. Kesar Singh is referred to as the nominal borrower, in other words, as agent for the real borrower.

The inference I draw from the pleadings is that the plaintiff required a government servant to sign I.O.U.'s for the money lent to the defendants as further security for his loans to them. The defendants offered Kesar Singh, a government servant who was accepted by the plaintiff because he knew him and they had been friends for a number of years according to the evidence. Furthermore the defendants pleaded that they paid interest direct to the plaintiff and not to or through Kesar Singh. The averment by the defendants in paragraph 4 of their defence that the plaintiff lent the sum of $22,500 to Kesar Singh can only be construed, in my view, to imply as agent for the defendants taking the defence as a whole and in its general context.

On these pleadings the parties went to trial. At the trial the plaintiff's case was that there were two transactions. The first as pleaded in his statement of claim, namely, that he lent the defendants a total sum of $15,000 by cash free of interest and there is a balance of $9,940 still outstanding. The second, an entirely separate and independant transaction not connected in any way with the present claim in which he lent Kesar Singh a total sum of $18,000 and there was a balance of $7,000 still outstanding.

The defendants' case was that the plaintiff agreed to lend money to one Naidu the managing partner of the defendant firm upon payment of interest and upon the condition that Kesar Singh was to be the nominal borrower who was to sign I.O.U.'s for the money lent and that the plaintiff

handed to Kesar Singh a total sum of $22,500 which Kesar Singh in turn handed to Naidu; that Kesar Singh had repaid to the plaintiff a sum of $15,500 which was given to him by Naidu leaving a balance of $7,000 which Kesar Singh had repaid to the plaintiff in 1962 and which Naidu had repaid Kesar Singh in 1963.

Furthermore they contended at the trial that the money borrowed from the plaintiff was borrowed by Hellenic Ship Supply Company, a subsidiary of the defendant firm.

In the result the learned trial judge found as a fact that there was only one transaction and that Kesar Singh was the intermediary and that a total sum of $22,500 was advanced by the plaintiff of which $15,500 had been repaid leaving a balance of $7,000 still outstanding and unpaid.

The learned trial judge disbelieved the evidence of Kesar Singh that he repaid the $7,000 to the plaintiff in 1962.

On the question of the defendants' liability the learned trial judge said:

"Now the question remains as to whether the defendants are liable to pay the $7,000. It is the contention of the defendants that there is no contract between the plaintiff and the defendants and that the plaintiff's cause of action is against Hellenic or alternatively against Naidu personally. There is no substance in this contention. First of all that is contrary to their pleadings. In para. 3 of their defence the defendants say that the plaintiff agreed to lend money to the defendants on certain conditions which the defendants agreed. There was no allegation that Naidu had no authority to act on behalf of the other partners. Secondly the money received from the plaintiff was paid into the account of the defendants and the payment of interest was by the defendants. Thirdly the defendants' solicitors in their letters of the 3rd and 22nd November, 1961, say that their clients the Seven Seas Supply Co. borrowed from the plaintiff through Kesar Singh the sum of $15,000 in March, 1961. Fourthly there is the document Ex. P1 of the 1st March, 1961, which clearly stated that the loan was to be made to Seven Seas and not Hellenic. On the evidence before me I have come to the conclusion that the principals to this transaction were the plaintiff and the defendants and that Kesar Singh was a common agent to both the parties."

With regard to the defendants' counterclaim for the return of the sum of $2,000 paid to the plaintiff as interest the learned trial judge stated that as no legal argument was advanced for the return of this sum which was agreed to by the defendants it would be dismissed with costs and he gave judgment for the plaintiff for $7,000 and costs.

Against that decision the defendants now appeal.

The main ground argued on the appeal was the first ground set out in the memorandum of appeal namely:

"That it was no part of the plaintiff's case as pleaded or presented that he had lent any sum to the defendants over and above the $15,000 specified in the amended statement of claim; that the learned judge found as a fact that a sum of $15,500 had been repaid to the plaintiff by the 7th October, 1961; and accordingly, as no application further to amend the statement of claim was made at any time nor has it in fact been so amended, the learned judge ought to have found in favour of the defendants."

In other words it was submitted that the learned trial judge had decided the case on issues not raised by the pleadings. It is a well established principle of law that a case must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment. If authority is needed see *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy.*[1]

In considering this question the pleadings must of course be taken as a whole. It cannot be disputed, I think, that the pleadings are far from satisfactory but, in my view, the issues decided by the learned trial judge were raised by and fall fairly and squarely within the general scope and ambit of the pleadings. It was the defence which raised the issue with regard to the transaction with Kesar Singh and that it was a loan to him.

The substantial issues raised by these pleadings were:— How much money was lent and to whom; how much was repaid and by whom.

These issues were tried and determined by the learned trial judge who arrived at the conclusion that a sum of money was lent by the plaintiff to the defendants; that part of that sum had been repaid by the defendants; that a balance was still due and owing by the defendants to the plaintiff which was in fact less than the amount claimed and judgment was given for the plaintiff accordingly.

The judgment was within the four corners of the issues raised by the pleadings as a whole and within the claim actually made by the plaintiff.

The core and essence of the claim was for money lent and it never changed its character throughout. The learned trial judge in effect found that the particulars of the plaintiff's claim were wrong and accepted those contended for by the defendants.

The defendants' contention on this point therefore, in my judgment, fails.

There remains the only other point of substance raised by the defendants that the loans were illegal and void under the provisions of the Moneylenders Ordinance, 1959 (No. 58 of 1959) and consequently not recoverable by the plaintiff. The ground of appeal was framed in this way:—

"That on the evidence the learned judge ought to

have found (albeit that this was not pleaded by the defendants but referred to in the affidavit sworn by R. M. K. Naidu on the 9th of December, 1961) that the plaintiff was a moneylender and, there being no suggestion that he was licensed as such, that the loans made by the plaintiff were illegal and void and hence not recoverable by him."

This defence was not pleaded.

Now it is well settled law that where a contract is *ex facie* illegal, the court will decline to enforce it, irrespective of whether illegality is pleaded or not.

The position is succinctly stated by Devlin J. in *Edler* v. *Auerbach* [2] at p. 697 cited with approval in *Snell* v. *Unity Finance Ltd.*[3] at p. 55 in this way:—

"That case" (*North-Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* [1914] A.C. 461) "authorises, I think, four propositions: first, that where a contract is *ex facie* illegal, the court will not enforce it whether the illegality is pleaded or not; secondly, that where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which taken by themselves show an illegal object have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not."

The court therefore ought not, on its own initiative, to refuse to enforce a contract on the ground of illegality unless it is quite certain that all the relevant facts are in evidence.

So far from being certain that all the relevant facts were before the court it appeared to me that essential evidence was missing.

The question of whether the plaintiff was a moneylender was disputed. The plaintiff was asked if he was a moneylender but he denied it and also the fact that the defendants had ever paid him interest. The matter was never explored in any detail nor given that close examination, it should have received and no doubt would have if it had been in issue and pleaded.

In these circumstances it is impossible to say that all the relevant circumstances relating to the question of whether the plaintiff was a moneylender or not were before the court.

I have come to the conclusion that the plaintiff is right in his contention that the third of those propositions enunciated by Devlin J. covers this case i.e. the court will not act on unpleaded facts unless it is satisfied that the whole of the relevant circumstances are before it.

For these reasons, in my judgment, this ground of appeal also fails.

There is, in my opinion, no substance in the remaining grounds argued on the appeal. They relate to findings of fact and I am unable to see any reason for disturbing them. There was evidence to support them and it was eminently a matter for the learned trial judge as to whether he accepted that evidence or not. The inferences which he drew from the evidence were, in my view, open to be drawn and I can find no reason for dissenting from his conclusions.

In the result the appeal fails on all points and must be dismissed with costs.

Tan Ah Tah Ag.C.J. and **Ambrose J.** concurred.

Appeal dismissed.

Solicitors: *Pillai & Co.; L. Rayner.*

BRITISH AND MALAYAN TRUSTEES LTD. v. TAN LIAN CHYE & ORS.

[O.C.J. (Buttrose J.) October 7, 1965]

[Singapore — Originating Summons No. 8 of 1965]

Landlord and tenant — Agreement to licence and authorize the running of the business of an amusement park on land — Whether a licence or a tenancy.

The trustees sought an order that the agreement entered into between them and one Goh Eng Wah constituted a licence and did not create a tenancy. The agreement was to license and authorise Goh Eng Wah to run the business of an amusement park on the land in question. The trustees had no power to grant a lease and the trustees therefore sought the approval of the court for the agreement.

Held: on a consideration of the document as a whole the agreement in this case constituted a licence personal to Goh Eng Wah and did not create a tenancy; and therefore it could be approved by the court.

Cases referred to:—

(1) *Torbett* v. *Faulkner* [1952] 2 T.L.R. 659.

(2) *Finbow* v. *Air Ministry* [1963] 2 All E.R. 647.

ORIGINATING SUMMONS.

Y. R. Jumabhoy for plaintiffs.

Philip Hoalim for the 1st defendant.

Harry Wee for the 2nd defendant.

K. C. Chan for the corpus beneficiaries.

Peter Guok for Goh Eng Wah.

Buttrose J. (delivering oral judgment): This is a summons taken out by trustees, the plaintiffs in this originating summons, seeking an order that the agreement dated 12th of August, 1965 and was made between them and one Goh Eng Wah constitutes a licence personal to the said Goh Eng Wah and does not create a tenancy of the land and premises referred to therein. The summons also seeks the court's approval of the agreement.

When I first glanced through the papers before the hearing, I formed the tentative